In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 450

THE ITEM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. 15–19) is reported at 220 F. 2d 956. A petition for a writ of certiorari to review the judgment entered pursuant to that opinion was denied on October 10, 1955, 350 U. S. 836. The court below wrote no opinion when it entered its subsequent order (of which review is now sought) denying petitioner's motion for modification of the judgment. The findings of fact, conclusions of law, and order of the

Board (R. 50–70)[1] are reported at 108 N. L. R. B. 1634.

JURISDICTION

The order of the court below denying petitioner's motion for modification of the original judgment was entered on September 6, 1956. The petition for a writ of certiorari was filed on September 24, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether, where a court of appeals has entered a judgment and this Court has denied certiorari, the court of appeals is required to reopen the case almost a year later because of a conflicting decision of another court of appeals.[2]

STATEMENT

Following the customary proceedings before the National Labor Relations Board, the Board found that petitioner had violated Sections 8 (a) (5) and (1) of the Act by refusing, since September 22, 1952, to furnish the bargaining representative with the wages of each employee in the bargaining unit and with the amount of the merit increase, if any, which each individual received during the preceding year (R. 51, 65). The Board accordingly ordered petitioner to cease and desist from the unfair labor practice found. Affirmatively, the Board ordered petit-

[1] The symbol "R." refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below and filed in this Court as No. 216, October Term, 1955.

[2] For the reasons stated below, p. 4, we believe that the Court need not reach the question presented in the petition.

ioner to furnish the bargaining representative upon request "the names identified with the respective merit increases, if any, granted to the employees in such unit during the preceding year, and the exact wages of each employee in the unit," and to post the usual notices (R. 52–53).

The court below filed its opinion directing enforcement of that order on April 6, 1955, and denied a petition for rehearing on May 17, 1955. This Court denied certiorari on October 10, 1955 (350 U. S. 836), and denied a petition for rehearing on November 21, 1955 (350 U. S. 905). On December 7, 1955, the court below denied petitioner's motion for a further stay of the order.

On June 25, 1956, the Court of Appeals for the Ninth Circuit handed down its decision in *National Labor Relations Board* v. *F. W. Woolworth Co.*, now pending before this Court on the Board's petition for certiorari, No. 413, this Term. The decision of the Ninth Circuit appears to be in conflict with the decision below. Relying on this conflict, petitioner, on August 10, 1956, moved the court below for "modification" of its order of April 6, 1955, "by rescission of any continuing application thereof" (Pet. 8). It is the denial of this motion which petitioner now seeks to review.

ARGUMENT

Petitioner requested the court of appeals to reopen the instant case some ten months after this Court had denied a petition for writ of certiorari and approximately eight months after this Court denied a

petition for rehearing. Assuming that there may be power in the court of appeals to reopen a final judgment when the period for seeking rehearing has long since passed (see Wiener, *The Supreme Court's New Rules,* 68 Harvard Law Review 20, 83–87 (1954)), it appears clear that, at the least, such a request would have to be accompanied by a truly extraordinary showing. The petition falls far short of establishing that there was an extraordinary cause for reopening in this case. Thus, even if the court of appeals had power to grant the motion to modify the judgment, there is no basis for believing that it abused its discretion in failing to do so and in adhering to ordinary principles of finality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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